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Dated: November 28, 2006

Signature:

(Michael H. Teschner)

Docket No.: SEDERM 3.3-010
(PATENT)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:
Karl Lintner

Application No.: 10/523,333

Group Art Unit: 1655

Filed: August 29, 2005

Examiner: A. L. Clark

For: COSMETIC OR DERMOPHARMACEUTICAL
COMPOSITIONS CONTAINING KOMBUCHA

**AMENDMENT IN RESPONSE TO RESTRICTION REQUIREMENT AND
ELECTION OF SPECIES**

MS Amendment
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This communication is in response to the Office Action mailed September 28, 2006, setting forth a Restriction Requirement and a Requirement for Election of Species in the above-identified application. Claims 1-29 were pending in the present application. Claim 12 is amended to include the limitations of claim 16, now cancelled. Consequently, claim 23 has also been cancelled. In addition, claims 24 and 29 have been amended to include the limitation recited in claim 16. Therefore, upon entry of this Amendment, claims 1-29 will be under examination.

Support for the amendment to claim 12 can be found, *inter alia*, on page 8, line 5 of the original specification. Therefore, the Amendment is fully supported by the specification and does not raise any issue of new matter. Accordingly, entry

of the present Amendment is respectfully requested.

In the Office Action, the Examiner required restriction to one of the following inventions under 35 U.S.C. §121 and 372:

I. Claims 12-27, drawn to a composition for topical application comprising: kombucha and a pharmaceutically acceptable carrier mixed with said kombucha.

II. Claim 28, drawn to an article comprising a composition for topical application comprising: kombucha and a pharmaceutically acceptable carrier mixed with said kombucha bound to any materials used for clothing.

III. Claim 29, drawn to a method of preventing the signs of endogenous and/or exogenous aging comprising the step of applying to the skin, mucosae or skin appendage a composition in accordance with claim 12 or 23.

In addition, the Examiner required the Applicant to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable.

In response, Applicant asserts that this restriction for lack of unity is improper in accordance with the decision in Caterpillar Tractor Co. v. Commissioner of Patents and Trademarks, 231 USPQ 590 (E.D. Va. 1986). Indeed,

"when the Office considers international applications as an International Searching Authority, as an International Preliminary Examining Authority, and during the national stage as a Designated or Elected Office under 35 U.S.C. 371, PCT Rule 13.1 and 13.2 will be followed when considering unity of invention of claims of different categories without regard to

the practice in national applications filed under 35 U.S.C. 111".

Here, it is applicant's position that there is unity of invention and that the restriction and the election are improper.

In the alternative, however, Applicant would elect the invention of Group I, which corresponds to claims 12-27. Of the species identified by the Examiner, Applicant would elect Specie A from claim 13 - the black tea plant from which kombucha is derived. However, this election is made with traverse, as the respective searches appear to be substantially coextensive for each of Groups I-III. Moreover, in view of the current amendment reciting the specific amounts at which the kombucha may be present, this common technical feature links each of claims 12-27. Furthermore, this common technical feature of the invention is neither anticipated nor rendered obvious by *Sarill et al.* (US 6,274,564).

In view of the foregoing amendment, notwithstanding the different classifications of the claims of Group I, II, and III, the "inventions" in these groups are related, and the respective searches would appear to be substantially coextensive. Therefore, it is respectfully submitted that a search for one "invention" will necessarily involve a search for the other as well. In accordance with the policies outlined in the Manual of Patent Examining Procedure, where possible, a search of all "inventions" should be made together. It is respectfully submitted that doing so in this instance will not be unduly burdensome. Reconsideration of the requirement and examination of all the claims are therefore respectfully requested and considered to be appropriate in this case. If, however, for any reason the Examiner does not believe that such

action can be taken at this time, the Examiner is invited to telephone the undersigned at 908-654-5000 so as to overcome any additional objections.

In the event the request to examine all the claims together is not granted, Applicant reserves the right to file a divisional application corresponding to the non-elected claims.